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No. 09-839

IN THE

Supreme Court of the United States

SYBLE HOOD
AND TOM H. WHITESIDE,

Petitioners,

v.

EDWARD D. JONES & CO., L.P.
AND ROBBY ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
EIGHTH COURT OF APPEALS OF TEXAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Have the Petitioners met their burden under Rule 14.1(g)(i) of the Rules of this Court in specifying the time, place, manner and disposition of the federal questions allegedly raised in the proceedings below?

2. Does certiorari jurisdiction exist where Petitioners did not raise a federal due process challenge to the trial court's discovery rulings until a Motion for Rehearing was filed with the Texas Supreme Court which, in turn, summarily denied said motion and did not expressly address the purported federal issue?

3. Have the Petitioners identified any considerations warranting review of their Petition under Rule 10 of the Rules of this Court and do any such considerations exist?

CORPORATE DISCLOSURE STATEMENT

Respondent Edward D. Jones & Co. L.P., a Missouri Limited Partnership, is not a subsidiary or affiliate of a publically held company. No publically owned company owns 10% or more of the general and/or limited partnership interests of Edward D. Jones & Co., L.P.

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STATEMENT

The tortured history of this case spans over ten years and three presidencies, and yet at the heart of Petitioners numerous appeals and now Petition for Writ of Certiorari rests a relatively simple state-law discovery dispute. Though the issues presently before the Court were not properly raised in the proceedings below, Petitioners contend that they were denied procedural due process in as much as: (1) Petitioner Hood was not permitted to conduct a wider breadth of written discovery in support of her state-law disparate impact age discrimination claim; and (2) the Court of Appeals declined their invitation to abrogate the attorney-client privilege simply because there was – at best – a slight discrepancy between a summary judgment affidavit and the trial testimony of a witness. Curiously, Petitioners make little argument in support of the questions they present to this Court, but have rather spent the balance of their Petition discussing a perceived bias within the appellate judiciary of the State of Texas. Yet even when pontificating on this extraneous political issue, and aside from the customary *ad-hominem* attacks on opposing counsel (a common theme throughout the Petitioners' many appeals), little mention is made of how, precisely, an alleged "ultra-conservative" state appellate judiciary has anything to do with the proverbial "price of tea in China."

Respondents would generally adopt the recitation of facts contained within the two opinions of the Eighth Court of Appeals of Texas, and would object to the extent that the purported facts within Petitioner's Statement

are inconsistent therewith. (Pet. App. G and H). Needless to say, the opinions rest entirely upon state law grounds, and do not dispose of any federal question.

Respondent's Brief in Opposition will concentrate primarily upon their obligations under Rule 15(2) of the Rules of this Court to address misstatements of the record and what issues would be properly before the Court in the event that certiorari was granted. To this end, Respondents would begin by noting that Petitioners have failed to comport with their obligations under Rule 14.1(g)(i) of this Court in identifying the trial and appellate disposition of the federal issue sought to be determined, so as to provide this Court with sufficient information to enable it to determine whether, under the circumstances, the exercise of certiorari jurisdiction is appropriate. In as much as Petitioners have failed to carry their burden of demonstrating that the federal due process question was properly presented in the courts below, this Court should decline to exercise jurisdiction. *Adams v. Robertson*, 520 U.S. 83, 90 (1997).

In fact, the Petitioners did not raise their purported due process issue until their respective Motions for Rehearing were filed with the Texas Supreme Court on June 29, 2009. As evidenced by Appendix M and N, the Texas Supreme Court summarily denied the Petitioners' Motions for Rehearing, and the Orders contain no language indicating that any federal question was considered or disposed of. (Pet. App. M and N). This case is therefore squarely within the ambit of the decision of this Court in *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., which* held that no certiorari jurisdiction from a final state court judgment will lay

when a federal question is raised for the first time on a motion for rehearing and where that court did not expressly decide the federal issue. 228 U.S. 326, 333-34 (1913). Consequently, it would appear that this Court lacks jurisdiction to entertain the Petitioners' case.

As a further matter, this Court has carefully crafted its Rule 10 to identify for would-be petitioners the legal concerns relevant to any decision by this Court to exercise certiorari jurisdiction. To this end, Petitioners have failed to address how, precisely, the instant case falls within this Court's conflicts jurisdiction, or why the decision of the court below concerns a question of significant federal import warranting the exercise of certiorari jurisdiction. Moreover, Respondents would show that Petitioners' tautological discourse respecting post-judgment discovery of privileged matters and their obtuse arguments pertaining to the scope of discovery of statistical information in a state-law disparate impact age discrimination claim present no such federal concerns.

REASONS FOR DENYING THE PETITION

A. The Petitioners Have Failed To Carry Their Burden In Demonstrating That The Federal Issues Sought To Be Determined By This Court Have Been Properly Raised In The Proceedings Below, As Is Required Under Rule 14.1(g)(i) of the Rules of This Court.

Under the conditions presently before this Court, this Court has resolutely refused to consider reviewing the decisions of state courts under the aegis of 28 U.S.C. § 1257, where the federal claim was not "addressed by or properly presented to the state court that rendered the decision" for which review has been requested. *Adams*, 520 U.S. at 86. Consequently, the Rules of this Court require that a petitioner must specify,

> both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and pertinent quotations of specific portions of the records or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

SUP CT. R. 14.1(g)(i). The Rules of this Court thus place an affirmative burden on the petitioner to demonstrate

the existence of certiorari jurisdiction. *See Johnson v. California*, 541 U.S. 428, 431 (2004).

Petitioners purported Statement of the case may be found on pages 2 through 31 of their Petition for Writ of Certiorari. Needless to say, the Petitioner's Statement contains no reference, beyond the relief requested from this Court, to any federal due process challenge mounted against the trial and/or appellate court's discovery rulings within the proceedings below. Moreover, there is nothing within the Petition filed with this Court or in Petitioners' Petition for Writ of Certiorari Appendix that would indicate actual consideration and/or disposition by the trial and/or appellate courts of any due process challenge to any discovery ruling mounted by the Petitioners[1]. Accordingly, because they have failed to carry their burden in demonstrating the existence of certiorari jurisdiction, as is required by the Rules of this Court, this Court should deny Petitioners' Petition.

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1. As previously stated, the Petitioners did, in fact, raise a federal due process challenge to the trial court's discovery rulings, but did so only within their Motions for Rehearing before the Texas Supreme Court. The Texas Supreme Court summarily disposed of the Motions without a substantive discussion of their merits. For the reasons set forth in part B, *infra*, this is insufficient to establish certiorari jurisdiction.

B. This Court Lacks Jurisdiction Over The Instant Proceeding, In As Much As The Federal Issue Was Untimely Raised For The First Time On The Petitioner's Motion for Rehearing And Was Not Expressly Decided By The Texas Supreme Court.

In *Radio Station WOW v. Johnson*, Justice Frankfurter succinctly stated the general proposition that "[q]uestions first presented to the highest court on a motion for rehearing come too late for consideration." 326 U.S. 120, 128 (1945) citing, *Simmerman v. Nebraska* 116 U.S. 54 (1885); *Godchaux v. Estopinal*, 251 U.S. 179 (1919); and *American Surety Co v. Baldwin*, 287 U.S. 156 (1932) see also *Hanson v. Denckla*, 357 U.S. 235, 243 (1958); and *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J. concurring). While this rule is not absolute, the holdings of this Court require that in order to establish certiorari jurisdiction in this context, the state court must "actually entertain[ ] and decide[ ] the federal question, and this appears of record . . ." *Consolidated Turnpike Co.*, 228 U.S. at 333-34. In this vein, a state court's disposition of a federal issue raised for the first time on a motion for rehearing which stated that a majority of that court did not consider a particular statute to be at odds with the First Amendment provided a sufficient basis for the exercise of certiorari jurisdiction. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975). On the other hand, conclusory statements by a state court to the effect that a federal issue, raised for the first time on rehearing, was fully considered and denied does not provide a sufficient basis for the exercise of certiorari jurisdiction. *Forbes v. State Council of Va.*, 216 U.S. 396, 399 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-437 (1908).

As previously stated, the Petitioners did not raise their due process challenge to the trial court's discovery rulings until Motions for Rehearing were filed with the Texas Supreme Court. The Orders disposing of these Motions are contained within Petitioners' Appendix M and N. The aforesaid Orders provide only that the Petitioners' respective Motions for Rehearing were denied and state no basis or otherwise provide any indication that the Texas Supreme Court actually entertained and decided the Petitioner's purported federal question. Therefore, the Orders are more akin to those at issue in *Forbes* and *McCorquodale*, than that addressed in *Cohn*. Consequently, Petitioners have failed to timely raise their due process claim in the proceedings below and this Court lacks jurisdiction under 28 U.S.C. § 1257.

C. Petitioners Have Not Identified Any of The Considerations Required Under Rule 10 Of The Supreme Court Rules, Nor Are Any Such Concerns Present Here.

Rule 10 identifies the considerations relevant in determining whether or not this Court will review a particular matter on a writ of certiorari. SUP CT. R. 10. In as much as this Petition is taken from the judgment of a state court, the concerns relevant here are addressed in Rules 10(b) and (c). Each of these grounds require the existence of an important question of federal law that a state court has actually decided. *Id.* The concerns addressed in subdivision (b) also require that a state court has decided an important question of federal law in a way that conflicts with another state court of last resort or with a United States court of

Appeals. *Id.* Subdivision (c) requires that a state court has decided an important federal question that has not been decided by this Court, but should be, or was otherwise decided in a manner which conflicts with the relevant decisions of this Court. *Id.*

Petitioners' Petition is bereft of any reference to Rule 10 or, for that matter, any notation to the Rules of this Court at all. Moreover, even with a liberal construction Petitioners' Petition does not address any concern identified by the applicable provisions of the Rule. For instance, throughout the forty-two page Petition, the term "Due Process" is referenced less than ten (10) times. Further, Petitioners engage in no substantive discussion of any case applying federal due process standards to a state court's discovery rulings regarding a state-law age discrimination claim.[2] As addressed in subsection A *supra*, Petitioners make no reference to any federal question that was ***actually decided*** by any of the courts below, nor do they identify any decision of any state court of last resort, Federal Court of Appeals, or decision of this Court which is in conflict therewith.

The only argument that Petitioners make that could potentially fall within the ambit of Rule 10 are their wild

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2. Pursuant to their Table of Authorities, Petitioners do cite to the case of *Smith v. City of Jackson*, 544 U.S. 228 (2005), on two occasions; however this case was decided under the Federal Age Discrimination in Employment Act and did not concern discovery issues per se. On the other hand, Petitioner Hood brought her claim under Chapter 21 of the Texas Labor Code and challenged the rulings made by the Court's below under the Texas Rules of Civil Procedure. TEX. LAB CODE § 21.001 *et seq.*

accusations of bias within the appellate judiciary of the State of Texas. Respondents strongly object to this characterization of the judiciary, and will not lend any credence to these accusations by responding to them as such. Suffice it to say, Petitioners have failed to identify any particularized harm they have suffered as the result of any prevailing conservative attitude among the Texas appellate judiciary, and especially that of the Eight Court of Appeals in El Paso. Moreover, the issue of the impartiality of the tribunals below was not timely raised, nor is it even framed within the questions presented for review to this Court.

Simply put, and despite all the window dressing, the Petitioners' claims concern garden variety discovery disputes that were decided by the trial and appellate courts in accordance with and pursuant to the Texas Rules of Civil Procedure. Petitioner Hood claims that although she was provided a company-wide list of all the names of all of the employees discharged by Respondent Edward D. Jones & Co., LP over the age of 40 for a ten year period, she was denied subsequent discovery over the same ten year period with respect to human resources analyses and other statistical data. However, Petitioner Hood fails to explain why she would be entitled to this information in light of the Respondent's objections to the breadth and scope of the request. Moreover, and as noted by the El Paso Court of Appeals, Petitioner Hood failed to marshal and utilize the materials that were produced that could have demonstrated trends which, in turn, might have bolstered her arguments and permitted her to overcome the Respondent's objections. *Hood v. Edward D. Jones Co.*, L.P., 277 S.W.3d 498, 504 (Tex.App.–El Paso 2009, pet denied).

As to their second contention, Petitioners contend that they should have been permitted to traipse through the Respondent's privileged files on the purported basis of the crime-fraud exception under Rule 503(d)(1) of the Texas Rules of Evidence in order to obtain alleged evidence in support of a premature Motion for Sanctions.[3] This request was premised upon "seemingly fraudulent" affidavits tendered in support of a Motion for Summary Judgment filed by Respondent Rogers. According to Petitioners, the "seemingly fraudulent" portion of the affidavit was a statement to the effect that Rogers had sole management control (a term of art) over the brokerage at issue when testimony elicited at trial indicated that he was required to have his decisions respecting the hiring and firing of employees ratified by Respondent Edward D. Jones & Co, LP's human resources department. As stated by the Court of Appeals, this is at very best a minor discrepancy in the testimony, and Petitioners had ample opportunity to cross examine and exploit this apparent weakness. *Hood*, 277 S.W.3d at 504.

Texas Law provides that in order to defeat the privilege under the crime-fraud exception, the opponent must make a *prima facie* showing of a contemplated fraud. *Granada Corp. v. First Ct. of Appeals*, 844 S.W2d 223, 277 (Tex. 1992). The rule does not provide that the party seeking to circumvent the privilege be given an opportunity to first conduct discovery of privileged materials and then make a *prima facie* showing, as is

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3. Petitioner Whiteside, counsel for Petitioner Hood, in fact admitted that he had no evidence in support of the Motion for Sanctions. *Hood*, 277 S.W.3d at 504.

argued by Petitioners. Otherwise, there would be no attorney privilege, as litigants would always do as Petitioners have done here, crying foul at the most minor of alleged inconsistencies in testimony, and following an adequate time in which to slander opposing counsel, begin demanding the turn-over of privileged files. To the contrary, however, the party seeking to avoid the privilege under this exception must make their *prima facie* case at first instance, or not at all. In this case, under the most favorable interpretation, Petitioners could point only to a slight aberration in testimony, which cannot possible carry their unquestionably heavy burden to defeat the privilege.

CONCLUSION

In sum, Petitioners have failed to carry their burden of establishing a basis for the jurisdiction of this Court as is required under the applicable Rules. Moreover, due to Petitioners failure to timely raise a federal question, this Court lacks jurisdiction to entertain Petitioners Hood's and Whiteside's Petition. Moreover, Petitioners have failed to identify any of the concerns required in Rule 10 of the Rules of this Court that would otherwise warrant discretionary review and no such concerns, in fact, exist. Accordingly, Respondents would request that the Petition be denied.

Respectfully submitted,

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